

IOWA DEPARTMENT OF NATURAL RESOURCES

ADMINISTRATIVE CONSENT ORDER

IN THE MATTER OF: CARROL & ARLENE HARBAUGH CLAYTON COUNTY, IOWA	ADMINISTRATIVE CONSENT ORDER NO. 2008-AFO- 39
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TO: Carrol and Arlene Harbaugh
26825 Ironwood Road
Elkader, IA 52043

I. SUMMARY

This Administrative Consent Order (Order) is entered into between Carrol and Arlene Harbaugh, and the Iowa Department of Natural Resources (Department) for the purpose of resolving violations of Iowa's requirements pertaining to manure application and control, and for fish kill restitution. In the interest of avoiding litigation, the parties have agreed to the provisions set forth below.

Any questions or response regarding this Order should be directed to:

Relating to technical requirements:

Sue Miller
IDNR Field Office #1
909 West Main, Suite 4
Manchester, IA 52057
Ph: (563) 927-2640
Fax: (563) 927-2075

Relating to legal requirements:

Randy Clark, Attorney II
Iowa Department of Natural Resources
Henry A. Wallace Building
Des Moines, Iowa 50319-0034
Ph: (515) 281-8891

Payment of penalty to:

Iowa Department of Natural Resources
Henry A. Wallace Building
Des Moines, Iowa 50319-0034
Attn: Randy Clark

II. JURISDICTION

This Order is issued pursuant to Iowa Code section 455B.175(1) which authorizes the Director to issue any Order necessary to secure compliance with or prevent a violation of Iowa Code

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Chapter 455B, Division III, Part 1 or Iowa Code Chapter 459, Subchapter III, and the rules adopted or permits issued pursuant thereto, and Iowa Code section 455B.109 and 567 Iowa Administrative Code (IAC) chapter 10, which authorize the Director to assess administrative penalties. This Order is also issued pursuant to Iowa Code section 481A.151 and 571 IAC 113.5 which authorize the Department to require restitution for destruction of wild animals.

III. STATEMENT OF FACTS

The Department has determined the following findings. Carrol and Arlene Harbaugh neither admit nor deny any violations of Iowa law.

1. Carrol and Arlene Harbaugh own and operate a dairy cattle confinement operation located in the SE1/4 of the SE1/4 of Section 27, T93N, R4W (Read Township), Clayton County, Iowa. The operation consists of two confinement buildings with a reported capacity of 165 head of dairy cows, or 231 animal units. Manure is stored in an uncovered, concrete manure storage structure (hereinafter, formed manure storage structure) constructed in 1997.

2. On August 19, 2005, Department Field Office #1 (FO1) staff investigated a complaint of dead fish in West Fork South Cedar Creek immediately upstream from the confluence with South Cedar Creek. Dead fish, including a trout, were observed at the location described by the complainant, in the SW1/4 of Section 31, T93N, R3W, (Garnaville Township), Clayton County. Dead fish were also observed in West Fork South Cedar Creek approximately several hundred yards upstream of said location. By collecting samples from West Fork South Cedar Creek and its tributaries, and analyzing for ammonia concentration using field test kits, FO1 staff traced the source of the ammonia contamination to the vicinity of the Harbaugh operation. Dark brown liquid, a manure odor and manure solids in the streambed were observed at the mouth of an unnamed tributary to the West Fork South Cedar Creek in the NW1/4 of Section 36, T93N, R4W. These conditions continued to be observed in the unnamed tributary all the way to its headwaters which are adjacent to the Harbaugh operation, approximately one mile upstream of the mouth of the unnamed tributary.

FO1 staff met with Carrol Harbaugh and his son Justin Harbaugh at the operation. FO1 staff observed the following: staining along the lowest area of the wall of the formed manure storage structure, possibly indicating that manure had recently overflowed the structure; and a flow path of manure solids from the formed manure storage structure, under the nearby county road via a culvert and then into the headwaters of the unnamed tributary. Carrol Harbaugh reported that the formed manure storage structure was constructed to hold manure from his confinement dairy operation but that it also collects storm water runoff from the area surrounding his confinement buildings. Mr. Harbaugh added that the structure is not large enough to retain all manure between periods of land application due to the additional storm water runoff and that he is consulting local NRCS staff regarding the design for an additional manure storage structure. FO1 staff observed that the freeboard in this formed manure storage structure was approximately one inch.

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Laboratory analyses of samples collected from the mouth and headwaters of the unnamed tributary revealed ammonia concentrations of 55 mg/L and 30 mg/L, respectively; an ammonia concentration of 0.08 mg/L was obtained from analysis of a sample collected from South Cedar Creek upstream of the confluence with West Fork South Cedar Creek.

3. A fish kill investigation was conducted by the Department's Fisheries Bureau staff on August 19, 2005. Approximately 2,226 fish, valued at \$664.22 (plus investigation costs of \$629.10), were killed in a 1.3 mile reach of West Fork South Cedar Creek.

4. By letter dated September 9, 2005, FOI notified Carrol Harbaugh that the Department's investigation on August 19, 2005, documented multiple violations of Iowa law and directed Mr. Harbaugh to submit within 60 days a plan detailing how manure will be retained between periods of land application and providing the construction dates of all confinement and manure storage structures. By letter dated November 7, 2005, Carrol Harbaugh reported that manure control at his operation would consist of applying manure to corn and alfalfa cropland at rates he has used in the past but he did not outline measures he would take to avoid manure control violations similar to those documented by the Department on August 19, 2005.

IV. CONCLUSIONS OF LAW

1. Iowa Code section 455B.186 and 567 IAC 62.1(1) prohibit the discharge of pollutants into waters of the State, except for adequately treated pollutants discharged pursuant to a permit from the Department. Since no such permit has been issued for this facility, the foregoing facts establish that this provision has been violated.

2. Iowa Code section 459.103 requires the Environmental Protection Commission to adopt rules related to the construction or operation of animal feeding operations, including minimum manure control requirements. The Commission has done so at 567 IAC Chapter 65.

3. 567 IAC 65.2(3) requires all manure produced in confinement operations to be retained between periods of application, and it prohibits the direct discharge of manure into state waters. The foregoing facts establish that this provision has been violated.

4. 567 IAC 65.2(3)"b" and "c" require that manure be removed as necessary to maintain a freeboard of at least one foot in unroofed formed manure storage structures; and that manure be removed as needed prior to periods when manure application cannot be conducted (due to inclement weather conditions, lack of available land disposal areas, or other factors) in order to assure that adequate capacity exists in the manure storage facilities. The foregoing facts establish that these requirements were violated.

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5. 567 IAC 65.2(9) requires any person storing, handling, transporting, or land applying manure from an animal feeding operation who becomes aware of a release to notify the Department of the release as soon as possible, but not later than six hours after the onset or discovery of the release. The foregoing facts indicate that this provision has been violated.

6. 567 IAC 61.3(2) provides general water quality criteria and prohibits discharges that will produce objectionable color, odor, or other aesthetically objectionable conditions; discharges that settle to form sludge deposits; discharges that interfere with livestock watering; or discharges that are toxic to animal or plant life. The foregoing facts establish that one or more of these criteria have been violated.

7. 567 IAC 65.5 provides that the Department may evaluate any animal-feeding operation to determine if manure from the operation: is being discharged into a water of the state and the operation is not providing the applicable minimum level of manure control; is causing or may reasonably be expected to cause pollution of a water of the state; is causing or may reasonably be expected to cause a violation of state water quality standards. If any of these conditions exist the operation is required, upon notification from the Department, to institute necessary remedial actions to eliminate the conditions. Based on the foregoing facts and conclusions, the Department further concludes that one or more of the above-described conditions may reasonably be expected to occur at this facility and Carrol and Arlene Harbaugh are hereby notified that they must perform remedial measures as specified in section V(1 & 2), below.

8. Iowa Code subsection 481A.151(1) provides a person who is liable for polluting a water of the state in violation of state law is also liable to pay restitution to the Department for injury to a wild animal by the pollution. The amount of the restitution shall also include the Department's administrative costs for investigating the incident.

V. ORDER

THEREFORE, the Department hereby orders and Carrol and Arlene Harbaugh consent to do the following:

1. By April 15, 2009, determine by survey the lowest point in the berm of each outside manure storage structure and establish a permanent measurement device in each cell to conveniently observe freeboard with respect to each low point. Thereafter, use the measurement devices to monitor freeboard as required in paragraph 2, below.

2. Commencing May 1, 2009, record freeboard measurements in each outside manure storage structure each week and the date of the measurement. In addition, record the date and before and after freeboard measurements when manure is removed from each structure. In addition, maintain these records on site for a period of five years from the date they are created.

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3. Within 60 days of the date this Order is signed by the Director, submit to Field Office #1 a written evaluation of your manure control facilities, and a plan for improvements (including modified or additional manure control facilities) designed to satisfy the minimum manure control requirements summarized in Section IV, paragraphs 3 and 4, above. The evaluation and plan shall be prepared by the NRCS or a similarly qualified agency or engineer. All manure control and improvements shall be installed within 90 days of submission of the plan; written confirmation by the NRCS, or other person who prepared the plan, that the plan has been properly implemented shall be submitted to Field Office #1 within 30 days of completion of the improvements.

4. Pay an administrative penalty of \$2,206.68. The penalty shall be paid to the Department within 30 days of the date the Director signs this Order.

5. Pay fish restitution of \$1,293.32 within 30 days of the date the Director signs this Order.

VI. PENALTY

1. Iowa Code section 455B.191 authorizes the assessment of civil penalties of up to \$5,000.00 per day for each violation of water pollution control laws; more severe criminal sanctions are also provided.

Pursuant to the provisions of Iowa Code section 455B.109 and 567 IAC chapter 10, which authorize the Director to assess administrative penalties, a penalty of \$2,206.68 is assessed. The penalty shall be paid within 30 days of the date the Director signs this Order. The administrative penalty is determined as follows:

a. Economic Benefit. Time and money were saved by the Harbaughs in avoiding proper manure control by not properly land-applying the manure and by not reporting the August 19, 2005 release. It is estimated that these savings are at least \$100.00 and that amount is assessed for this factor.

b. Gravity of the Violation. One of the factors to be considered in determining the gravity of a violation is the amount of penalty authorized by the Iowa Code for that type of violation. As indicated above, substantial civil penalties are authorized by statute. Despite the high penalties authorized, the Department has decided to handle the violations administratively at this time as the most equitable and efficient means of resolving the matter. Actual harm to the environment was documented by water quality analysis, and by visual and olfactory observation of impact to the unnamed tributary and to West Fork South Cedar Creek including dead fish. \$2,000.00 is assessed for this factor.

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c. Culpability. The Harbaughs admitted that the manure storage structure is not large enough to contain all manure between periods of land application, so they should have been more diligent in monitoring the manure level. Therefore, \$106.68 is assessed for this factor.

VII. WAIVER OF APPEAL RIGHTS

Iowa Code sections 455B.175(1) and 481A.151, and 561 IAC 7.5(1), as adopted by reference by 567 IAC chapter 7, authorize a written notice of appeal to the Environmental Protection Commission. This Order is entered into knowingly by and with the consent of Carrol and Arlene Harbaugh. By signature to this Order, all rights to appeal this Order are waived by Carrol and Arlene Harbaugh.

VIII. NONCOMPLIANCE

Failure to comply with this Order may result in the imposition of further administrative penalties or referral to the Attorney General to obtain injunctive relief and civil penalties pursuant to Iowa Code sections 455B.191 and 459.603. Compliance with provision "V. Order" of this Order constitutes full satisfaction of all requirements pertaining to the violations described in Division IV of this Order. The Department reserves the right to bring enforcement action or to request that the Attorney General initiate legal action to address other violations not described in this Order but which may arise from the facts summarized in Division III of this Order.

for Edmund J. Leopol
RICHARD A. LEOPOLD, DIRECTOR
IOWA DEPARTMENT OF NATURAL RESOURCES

Dated this 30th day of
December, 2008.

Carrol Q. Harbaugh
CARROL HARBAUGH

Dated this 19 day of
Dec., 2008.

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ISSUED TO: CARROL & ARLENE HARBAUGH

Arlene Harbaugh
ARLENE HARBAUGH

Dated this 19 day of
Dec., 2008.

Field Office 1; Randy Clark; Gene Tinker; VIII. D.1.a, D.2.a, D.2.d, D.3.a